

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JESUS CABRERA)	
)	CIVIL ACTION NUMBER
Claimant- Below, Appellant)	
v.)	
)	09A-06-013-JOH
JDH CONSTRUCTION)	
)	
Employer Below, Appellee)	

Submitted: March 1, 2010

Decided: June 30, 2010

MEMORANDUM OPINION

*Appeal from a Decision of the Industrial Accident Board - **AFFIRMED***

Appearances:

Michael B. Galbraith, Esquire, of Weik, Nitsche, & Dougherty, Attorney for Employee-Below, Appellant

Christopher J. Logullo, Esquire, of Chrissinger & Baumberger, Attorneys for Employer-Below, Appellee

HERLIHY, Judge

Jesus Cabrera claims he was injured when he fell off a truck while working for his former employer, JDH Construction. He says he suffered myriad injuries to his neck, back, left leg and arm as well as painful urination. He filed a Petition to Determine Compensation Due with the Industrial Accident Board. After a hearing, the Board found Cabrera lacked credibility and determined that he did not meet his burden of proving an industrial accident occurred and denied him compensation. On appeal, the Court finds that the Board properly discharged its exclusive authority as finder of fact to determine the credibility of witnesses. Its credibility determination was based upon substantial evidence and clearly laid out in its decision and will not be disturbed. Therefore, the Board's decision is **AFFIRMED**.

Factual Background

On October 2, 2008, Jesus Cabrera asserts he was injured when he tripped on a wooden pallet that was sitting inside a truck owned by his employer at the time, JDH Construction. He says that he fell approximately four feet to the ground below. There were not witnesses. He notified two supervisors of his fall and one, Kenny Garcia, instructed him to take a work truck to drive to a nearby store and purchase over the counter pain medication. The testimony from Cabrera and Garcia place the time of the alleged fall at 1:30 to 2:10 p.m.

Cabrera claims that he was unable to work the rest of the day and spent the balance in a truck resting at Garcia's suggestion. Garcia, however, testified that Cabrera was able

to complete his work that day and finished up the day to 6:00 p.m. performing his typical duties, which included bagging materials, climbing a ladder to foam seal windows and knelling to apply caulk on the ground. Garcia testified to the Board that Cabrera did not complain after his alleged fall, but did mention it numerous times throughout the day.

Cabrera went to the Christiana Hospital emergency room the day of the claimed injury. The hospital records indicated that he arrived at the emergency room at about 7:50 p.m.¹ He complained of pain to his low back and left knee. The records indicated that he walked with a normal gait, that an examination of his knee found no swelling or effusion, but there was bony point tenderness. X-rays of the knee and lumbar spine were negative and he was diagnosed with a left knee contusion and lumbar strain. He was given pain medication.

John Husband, president of JDH, testified that he first learned of Cabrera's alleged fall on October 3rd. He testified that Cabrera did not report to work on October 3rd until the end of the day. When he returned, he had a doctor's note that excused him until October 6th. Husband observed that Cabrerea did not have difficulty walking when he presented the note and was able to ascend a set of stairs to deliver the note to another JDH employee.² Husband told Cabrera to rest that weekend and to return to work on Monday,

¹ The hospital records were introduced through the testimony of Cabrera's expert, Dr. Damon C. Cary and JDH's expert, Dr. Andrew J. Gelman.

² Cabrera denies that he had to ascend stairs to deliver the note, but instead found the note's
(continued...)

October 6th. If he was unable to work on a truck, Husband told Cabrera he could perform office work instead.

Cabrera went to the Westside Health Center in Wilmington on October 17, 2008. He complained of back and leg pain and noted that both legs went numb when he sat down. In addition, he had urinary complaints. The Westside records indicate that Cabrera was injured in a motor vehicle accident which occurred two weeks prior. Due to urinary retention problems, Cabrera was sent to the emergency room. The emergency room admission records note similar complaints and a report of being injured in an automobile accident on October 6th; however, the emergency room's physician record from that date indicates he was injured on October 2nd when he fell from a truck at work. Cabrera claims that the physician at Westside was unable to understand him because she did not speak Spanish and he does not speak English.³ He states that he never was involved in a motor vehicle accident after the fall.

After the second hospital visit, Cabrera began treatment with two doctors, Dr. Cary and Dr. William E. Cowan, III. Each testified to the lasting effects of Cabrera's injuries. Both Drs. Cary and Cowan both treated Cabrera extensively and conclude that he is totally

²(...continued)
recipient, Sarah, outside smoking a cigarette.

³ Cabrera is from Mexico and testified he had been in the United States for eighteen months prior to this incident.

disabled and cannot work.⁴

The Board, in denying compensation noted that Cabrera had the burden to prove that he was involved in an industrial accident and that accident caused the injuries for which he now seeks compensation. The Board noted that no one observed the alleged injury. It then found Cabrera not credible and discounted his version of the events that took place. Without any additional testimony, the Board concluded that no industrial accident took place.

The Board found Cabrera not to be credible based upon three discrepancies in his testimony as compared with other evidence. First, the Board noted the discrepancy between Garcia's and Cabrera's stories. Cabrera testified that he sat in the truck the rest of the day, while Garcia indicated that he continued to work. Second, Cabrera testified that he went directly to the hospital following his alleged fall; however, the hospital records indicate he did not go to Christiana Hospital until over five hours later. Third, the Board had credibility concerns because of the mention of a motor vehicle accident detailed in the October 17th medical records.

The Board had specific concerns with the motor vehicle accident and Cabrera's explanation concerning how the mention of the accident made its way into the records. Cabrera testified that the doctor at Westside did not speak Spanish and therefore

⁴ Because the Board found that Cabrera was never injured on the job, and the Court affirms that finding, the Court does not need to detail all of the treatments and diagnoses Cabrera received.

misunderstood Cabrera's description of his injury. The Board found this not credible because the records were extremely detailed, that it was unlikely that Westside Health would not have Spanish speakers available to its patients, and there was testimony from Dr. Cary, Husbands and Garcia that they were all able to communicate with Cabrera in English.⁵

The Board found that Cabrera did not discharge his burden to prove that he was injured while working for JDH Construction and dismissed his petition.

Parties' Contentions

Cabrera argues that the Board impermissibly raised his burden of proof because the alleged injury was not witnessed. He argues that the Board cannot discard objective evidence such as the emergency room records from October 2nd and Dr. Gelman's review of those records that indicate he suffered a knee contusion and lumbar strain. Cabrera argues that to ignore this evidence is error because the fact that he went to the hospital on the date of the alleged fall is strong evidence that he actually fell. According to Cabrera, the Board should have explained why it was disregarding evidence that supported

⁵ Cabrera's ability to communicate in English was addressed at multiple points in the Board hearing as discussed in the Board's decision and the record: Cabrera spoke with Dr. Cary in English and Dr. Cary reported his knowledge of English was difficult but they were able to get through it; Garcia testified that he never had problems speaking with Cabrera in English, although he had an accent; Husbands testified that he was able to speak English and would have been required to do so as a driver pursuant to a federal regulation; Dr. Gelman utilized an interpreter when he examined Cabrera.

Cabrera's version of the event. Cabrera argues that the alleged motor vehicle accident from October 6th is not relevant to determining whether there was an injury, but only to determine which injuries were caused by the accident.

In response, JDH claims that the Board's decision was based on substantial evidence and the Board properly fulfilled its function as the trier of fact. It asserts the Board neither raised nor lowered Cabrera's burden of proof but simply noted the unenviable position a Claimant is in when he must present a claim with no corroboration. Finally, JDH argues that the Board does not have to find an industrial accident took place simply because there was a hospital visit and the Board properly served its function by making its credibility determination.

Standard of Review

The duty of the Court is on appeal from the Industrial Accident Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error.⁶ The Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility and make its own factual findings and conclusions.⁷ However, the Board must give its reasons for reaching the credibility conclusions it does.⁸ Only when there is no substantial, competent evidence to support the Board's factual

⁶ *Gen. Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985).

⁷ *Munyan v. DaimlerChrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

⁸ *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).

finding may this Court overturn the Board's decision.⁹ When reviewing the Board's decision for substantial evidence the Court will consider the record in the light most favorable to the prevailing party below.¹⁰ The Claimant has the burden of establishing a work-related injury and the extent of the injury.¹¹

Discussion

The Court finds that the Board acted within its authority to disregard the testimony of Cabrera because it found problems with his credibility. In a case such as this, where there is only one witness to the alleged industrial accident, credibility of the claimant could very well be the deciding factor. The Court notes that there is evidence of an industrial accident, as was shown by him going to the emergency room the day of the alleged accident and by mentioning that he did, in fact, fall. However, because of the diminished credibility of Cabrera, the Board did not have reason to believe that he was being genuine in his description of the events. Once the Board determined that there was no fall, the Petition needed to be denied.

In order to be compensable, a Claimant must prove that the injury happened at a fixed time and place and was attributable to a clearly traceable incident of employment.¹²

⁹ *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).

¹⁰ *Sewell v. Del. River and Bay Auth.*, 796 A.2d 655, 660 (Del. Super. 2000).

¹¹ *Gray's Hatchery & Poultry Farms v. Stephens*, 81 A.2d 322, 324 (Del. 1950).

¹² *Ibid*

The Board found no such incident took place. After that finding, the expert's opinions became irrelevant. The degree of injury is no longer a consideration if the Board determines that no accident in fact took place.

Cabrera takes offense with the Board's finding with regard to the alleged October 6th motor vehicle accident. He mischaracterizes the Board's finding. It did not hold that the October 6th accident did or did not occur. If an accident had occurred, the subsequent motor vehicle accident would become highly relevant as it related to causation and damages, but that is not this case. The alleged October 6th accident was yet another inconsistency in the testimony that the Board cited when it explained its credibility rationale. It was not used as substantive evidence; it did not have to be used as such.

The Board's decision to discredit Cabrera was based on substantial evidence. After it made that determination, it was within its right to find, based on the other evidence presented, that he did not meet his burden of proof. The Court, sitting as an appellate court, will not disrupt the Board's factual findings and the Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

J.